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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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JUL 30 1997

In re

Amendment of § 73.202(b) of the Rules,
Table of Allotments, FM Broadcast Stations
(Llano and Marble Falls, Texas)

MM Docket No. 95-49
RM-8858
8558

To: The Chief, Allocations Branch,
Mass Media Bureau

OPPOSITION TO JOINT PETITION FOR RECONSIDERATION

Maxagrid Broadcasting Corporation (*Maxagrid*), the licensee of station KBAE(FM), Channel 285C3, Marble Falls, Texas, hereby opposes Roy E. Henderson's and Tichenor License Corporation's (*TBC's*)(collectively, the *Joint Petitioners*) Joint Petition for Reconsideration in this proceeding.

I. BACKGROUND

1. The Report and Order, 62 Fed. Reg. 31008 (June 6, 1997).(the Order) granted Maxagrid's Petition for Rule Making, and amended § 73.202(b), the FM Table of Allotments. Specifically, the FCC:

- substituted Channel 285C3 at Marble Falls, Texas for the then-existing Channel 284C3 at Llano, Texas;
- concomitantly modified station KBAE's license; and
- allotted Channel 242A to Llano to ensure continued local service there.

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2. The Order also:

- dismissed Mr. Henderson's initial Counterproposal in response to the Notice of Proposed Rule Making in this proceeding, 10 FCC Rcd 4913 (1995), which Mr. Henderson later sought to withdraw¹; and
- rejected Mr. Henderson's and TBC's "Joint Counterproposal" in response to the Further Notice of Proposed Rule Making, 11 FCC Rcd 12647 (1996).²

The Joint Petitioners seek the Order's reversal.³ They claim that the FCC "misunderstood the Missouri City reallocation as a counterproposal to the original Marble Falls proposal. when, in fact, it was a counterproposal to the allocation of Channel 242A at Llano... [and] "misconstrued [TBC's] proposal to lack a sufficient commitment to apply for Channel 242C2 as a new allotment at Menard."

3. As Maxagrid will now show, the Joint Petitioners have failed to establish that reconsideration is warranted. Their claims are ludicrous. *The FCC neither "misunderstood" nor "misconstrued" anything: the Order was the right decision on the merits in this case.*

¹ Mr. Henderson, the licensee of station KLTO, Channel 285A, Rosenberg, Texas, initially sought the reallocation of Channel 285A to Katy, Texas, and modification of KLTO's license to specify operation at Katy. The Rosenberg-to-Katy move would have required a site and city-of-license change by station KBUK, Channel 285A, LaGrange, Texas. Because KBUK's licensee, Fayette Broadcasting Corporation, had not consented to the proposed reallocation and transmitter relocation, the Commission properly found Mr. Henderson's initial Counterproposal unacceptable. Order at n. 3.

²The "Joint Counterproposal" asked the FCC to *both* relicense TBC's Channel 285A, Galveston station KLTP to Menard, Texas, on Channel 242C2; *and* to upgrade Mr. Henderson's cochannel station KLTO to Channel 285C3 and relicense it to Missouri City, Texas.

³They have also sought a stay of the Order. Maxagrid has opposed that request.

II. ARGUMENT

BOTH KATY/SMITHVILLE AND MISSOURI CITY/MENARD WERE FATALLY FLAWED

A. KATY/SMITHVILLE

4. Notwithstanding his subsequent attempt to withdraw it, Mr. Henderson did indeed advance an initial Counterproposal requesting KLTO's relicensing to Katy, Texas, and to make that work, KBUK's relicensing from LaGrange to Smithville (with a site change to make city-grade at Smithville). The Commission correctly found Mr. Henderson's initial Counterproposal fatally flawed and unacceptable for rule making, n. 2, supra. The Joint Petitioners do not dispute this aspect of the Order.

B. MISSOURI CITY/MENARD

1. MISSOURI CITY

5. Except in limited circumstances not relevant here,⁴ the test as to whether a filing rises to the level of a Counterproposal is mutual exclusivity.⁵ Depending on the circumstances, the mutual exclusivity will be, and can only be:

- with the allotment advanced in the Notice of Proposed Rule Making;
- with an allotment advanced in a Counterproposal; or
- with an alternative channel the FCC might adopt at the community advanced in the NPRM or Counterproposal.

⁴See, e.g., Harrisburg and Albemarle, North Carolina, 11 FCC Rcd 2511 (1996).

⁵ See, e.g., Chico, California, 6 FCC Rcd 4294 (1991); Banks, Oregon, 6 FCC Rcd 2462 (1991) at n. 1; Columbus, Kansas, 6 FCC Rcd 1597 (1991).

6. It practically goes without saying that merely being a Counterproposal (that is, being mutually exclusive) isn't enough to garner basic eligibility for comparative consideration in a rule making. A Counterproposal must also be acceptable for rule making. To be acceptable, among other things, a Counterproposal must advance an allotment that is fully spaced (other than to the subject of the NPRM and to any Counterproposals already on file) and that provides city-grade service to its entire proposed community of license. *Also, and by no means least significant, the Counterproposal must be on file with the FCC by the close of the Comment deadline in the proceeding.* See §§ 1.420(d) of the Rules; see also Appendix to the NPRM; Woodville, Mississippi et al., 11 FCC Rcd 4712, n. 4 (1996); Pinewood, South Carolina, 5 FCC Rcd 7609 (1990); Scranton and Surfside Beach, South Carolina, 4 FCC Rcd 2366 (1989).

7. Mr. Henderson's original Counterproposal, Channel 285A at Katy/Channel 285A at Smithville, would be mutually exclusive with Channel 285C3 at Marble Falls. *That is precisely why Mr. Henderson filed it as a Counterproposal to the NPRM.* And whatever its defects, Mr. Henderson at least filed his original Counterproposal, Channel 285A at Katy/Channel 285A at Smithville, by the deadline for Counterproposals to the NPRM. Fatally flawed in other respects, but at least timely....

8. The Joint Petitioners correctly state that Mr. Henderson's component of the Joint Counterproposal, Channel 285C3 at Missouri City, would not be mutually exclusive with the NPRM, Channel 285C3 at Marble Falls. Thus, Channel 285C3 at Missouri City would *not* have been a Counterproposal to the NPRM proper. But Channel 285C3 at Missouri City *is* mutually exclusive with Mr. Henderson's Initial Counterproposal, Channel 285A at Katy and Smithville.

9. The Marble Falls/Katy/Missouri City sequence is the classic A/B/C “daisy chain” the Commission has seen arise time and time again. Because of their mortal threat to orderly processing, the FCC refuses to consider links in the chain forged after the original cut-off date or Counterproposal deadline in the proceeding. Kittyhawk Broadcasting Corp., 7 F.C.C. 2d 153, 155 (1967), appeal dismissed sub nom. Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968):

Any other interpretation of the rule would result in its destruction because if C were accepted for filing, any applications filed subsequent thereto and in conflict with C would be entitled to consolidation in the ABC group. In theory, at least, the chain might never end, and any attempt to establish cut-off dates would be nugatory.

To nip such administrative havoc in the bud, the FCC has enforced its cut-off rules strictly — even when this causes “harsh results.” See, e.g., State of Oregon, Etc., 11 FCC Rcd 1843 (1995); Sacramento Community Radio, 8 FCC Rcd 4067 (1993); The Florida Institute of Technology, 4 FCC Rcd 1549 (1989), aff’d, 952 F.2d 549 (D.C. Cir. 1992); Nazarene Theological Seminary Radio Corporation (KSTR), 52 Rad. Reg. (P&F) 2d 559 (Broadcast Bur. 1982); Pinewood, South Carolina, *supra*, LaGrange, Kentucky, 33 Rad. Reg. (P & F) 2d 1390 (1975).

10. *Mr. Henderson and TBC filed their “Joint Counterproposal” more than a year after the NPRM’s deadline for Counterproposals to the NPRM and to other Counterproposals to the NPRM. That is precisely why Mr. Henderson’s component of the “Joint Counterproposal” is fatally flawed. But that’s not the sole defect of Channel 285C3 at Missouri City...*

11. Channel 285C3 at Missouri City is short spaced to TBC’s cochannel Galveston station KLTP. Recognizing this, the “Joint Counterproposal” sought the deletion of Channel 285A at Galveston and KLTP’s reassignment to Menard, Texas on Channel 242C2. Channel

242C2 at Menard would be mutually exclusive with the replacement channel allotted to Llano, Channel 242A. But Channel 285C3 at Missouri City is not mutually exclusive with either Channel 242A at Llano, or Channel 242C2 at Menard.

12. The Further NPRM in this proceeding solicited *only Counterproposals to Channel 242A at Llano, or to Counterproposals to any Counterproposals that might be filed in response to the Further NPRM*. See Appendix to the Further NPRM. Because Channel 285C3 at Missouri City is not mutually exclusive with the Further NPRM, Channel 285C3 at Missouri City is, *on its face*, not properly a part of this proceeding.

- In the context of the NPRM, it is a belatedly filed link in a daisy chain.
- And in the context of the Further NPRM, it is not mutually exclusive with the Further NPRM or any Counterproposal thereto. See n. 2, supra.

13. What's more, Channel 285C3 at Missouri City is defective as a contingent allotment. Channel 285C3 at Missouri City does not work, technically, so long as cochannel Galveston Class A station KLTP exists. Mr. Henderson would have to get KLTP out of the way before his cochannel station KLTO could move to Missouri City and upgrade to Class C3.

And that can only happen through rule making:

- KLTP cannot simply change site to accommodate KLTO as a Channel 285C3 Missouri City facility. No alternative site would be *both* fully spaced (considering KLTO with Class C3 facilities at Mr. Henderson's reference point) *and* close enough to Galveston for KLTP to make city grade.
- KLTP cannot simply change channel at its licensed site to accommodate KLTO as a Channel 285C3 Missouri City facility. No alternative channel is fully spaced at that site (again, considering KLTO with Class C3 facilities at Mr. Henderson's proposed reference point, and considering no other amendments to the Table).

- As a final alternative, TBC theoretically could surrender its license for KLTP, and Mr. Henderson could then seek the deletion of Channel 285A at Galveston and his desired modifications to KLTO.⁶ But that is not possible in this proceeding. It would not comprise a Counterproposal to the NPRM or to the Further NPRM, and the time for advancing new allotment proposals passed long ago. Moreover, before the Commission could extinguish a facility and delete the underlying allotment, it would have to solicit expressions of interest in Channel 285A at the pertinent community. Casper and Sheridan, Wyoming, 6 FCC Rcd 2880 (1991). There would likely be many comers.

So, for KLTO to implement the upgrade and relicense, KLTP would first have to successfully prosecute its own rule-making proceeding. To put in another way, Mr. Henderson's changes to KLTO would depend for their viability on a successful conclusion to a KLTP proceeding. *But to be delicate about it, there is a problem here. The FCC "will not accept and process a Counterproposal contingent upon the outcome of a pending rule making proceeding."* Stonewall, Mississippi et al., DA 96-366 (adopted March 15, 1996 and released March 26, 1996), citing, Broken Arrow, Oklahoma et al., 3 FCC Rcd 6307 (1988), recons. den., 4 FCC Rcd 6981 (1989).

14. Channel 285C3 at Missouri City also suffers a Cut and Shoot problem *in the extreme*. In Cut and Shoot, Texas, 11 FCC Rcd 9501 (M.M.Bur. 1996), the FCC announced its intent to reject proposed allotments that are contingent upon the outcome of another station's modification. Specifically, in Cut and Shoot, the petitioner sought the allotment of Channel 235A to Cut and Shoot. The proposed allotment's reference point was short spaced to the licensed site of first-adjacent station KYKR, Channel 236C1, Beaumont, Texas, but fully spaced to KYKR's site-change construction permit. The FCC said that granting allotment requests in

⁶Or, Mr. Henderson could surrender his license for KLTO, and TBC could seek to relicense and upgrade KLTP to Channel 285C3 at Missouri City.

such cases causes undesirable and unnecessary problems to its staff and unfair burdens on “other parties in rule-making proceedings with proposals that are not contingent on the licensing of facilities set forth in an outstanding construction permit.” Id. at para. 5. Here, Mr. Henderson’s component of the “Joint Counterproposal” depends not just on the licensing of nonexistent KLTP facilities elsewhere, but also on KLTP’s success in a nonexistent rule making, and on KLTP’s receipt and implementation of a CP for which it cannot even apply until it has achieved (if it ever does achieve) success in the totally hypothetical rule making.

2. MENARD

15. TBC’s component of the “Joint Counterproposal” is also fatally defective. First, TBC’s half of the “Joint Counterproposal” is inextricably intertwined with that of its partner-in-rule-making, Mr. Henderson. TBC stated it was only interested in moving KLTP from built-up Galveston to rural Menard “upon the adoption of this entire counterproposal.” Joint Comments and Counterproposal at 6. The defects in Mr. Henderson’s half “of this entire Counterproposal” are fully imputable to — and fatally taint — TBC’s half.

16. Moreover, the parties explicitly and incontrovertibly stated their intent that the Commission consider their “entire counterproposal” as a package. Thus, TBC never advanced a timely, unequivocal, and noncontingent statement of intent to construct its proposed facility. Its statement of interest in Menard was qualified and contingent upon mutual success with Mr. Henderson’s allotment proposal (defective though it was in its own right). This contingency rendered TBC’s half of the “entire” “Joint Counterproposal” fatally defective. Stonewall.

Mississippi et al., and Cut and Shoot, *supra*.

17. The lack of a noncontingent pledge to implement TBC's half of the "entire counterproposal" rendered it incomplete. It is beyond dispute that a Counterproposal:

must be technically correct and substantially complete when filed to afford all parties an opportunity to afford all parties an opportunity to respond in reply comments. *See Eldorado and Lawton, OK*, 5 FCC Rcd 6737 (1990), and cases cited therein.⁷

18. TBC now struggles, in vain, to pull the Tar Baby away from its bosom. With new-found explicitness and courage, TBC now claims that it will take a stab at relicensing KLTP to Menard even without the shield of § 1.420(i) of the Rules. In a plain — but vain — effort to perfect its original, defective filing, TBC says it is ready to go head-to-head with any other applicants for a new allotment at Menard. But the FCC correctly construed the plain language of the "Joint Comments and Counterproposal. And it's far too late for such back-peddaling and back-filling, especially when it prejudices innocent parties.

*The FCC's procedural rules are designed to provide adequate time and opportunity to interested parties to fully participate in the decisionmaking process and to avoid prejudice to competing parties by providing predictable, uniformly applicable rules. They also permit the Commission to conduct its business within a reasonable period of time so as to avoid undue delay in the provision of service to the public. Accordingly, the Commission has required strict adherence to appropriate administrative standards. * * * In the application context, to consider a late-filed application is generally unfair to competitors and delays the provision of new service to the public. Similar concerns prevail in contested allotment proceedings.* [Emphasis added; footnote omitted.]

Santa Isabel, Puerto Rico et al., 3 FCC Rcd 2336, 2337 (1988).

⁷Berlin, Wisconsin et al., 10 FCC Rcd 7733 (1995). See also, *among many others*, Mt. Morris, Illinois et al., 4 FCC Rcd 5485 (1989), *recons. den.*, 5 FCC Rcd 1750 (1990); Clewiston et al., Florida, 9 FCC Rcd 4051 (1994).

III. CONCLUSION


19. This rule making has been going on for nearly three years. The people of Marble Falls are still waiting for — *and more than ever deserve* — their first ever local service. Maxagrid is taking steps to provide that new service to them. The Commission can lend material assistance by forthwith and outright rejecting the Joint Petition for Reconsideration, and by promptly terminating this proceeding.

20. *No reconsideration is warranted here, and the FCC should promptly so hold.*

Respectfully submitted,

MAXAGRID BROADCASTING CORPORATION

By



J.J. McVeigh

Its Counsel

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Date: July 30, 1997

EXHIBIT A

STEPHAN M. KRAMER, P.E. AND ASSOCIATES
BROADCAST AND FAA CONSULTING ENGINEERS
10500 BIGHORN TRAIL, SUITE 100 FRISCO, TX 75035-6626 (972) 529-5123

Engineering Statement

This Engineering Statement was prepared on behalf of Maxagrid Broadcasting Corp. in support of an Opposition to Joint Petition for Reconsideration.

With regard to the proposal to allot Channel 285C3 at Missouri City, Texas (reference coordinates N.L. 29-37-06, W.L. 95-32-15, the distance toward licensed station KLTP, Channel 285A at Galveston, Texas (reference coordinates N.L. 29-23-45, W.L. 94-44-10) is 81.5 kilometers. Section 73.207 requires a minimum separation of 142 kilometers between cochannel Class C3 and A stations, and thus the proposal conflicts with the existing licensed KLTP facility. Table 1.0 presents the study results.

The proposal to allocate Channel 285C3 to Missouri City DOES NOT conflict either the allotment of Channel 242A at Llano, Texas or the allotment of Channel 242C2 at Menard, Texas. These proposals are separated by 43 channels, and a review of Section 73.207(b)(1) revealed there were in fact no restrictions with respect to allocation spacing between such channels.

With respect to the licensed facility for KLTP, Channel 285A at Galveston, the short distance toward the cochannel proposal for Missouri City made it impossible to relocate the KLTP transmitter and provide the required 142 kilometer separation toward Missouri City AND simultaneously provide the required city grade signal contour over Galveston as outlined in Section 73.315. It would be necessary to relicense KLTP to an alternate community.

Finally, a frequency search and detailed channel studies were completed to determine if station KLTP could change frequency and provide continued service to Galveston as a Class A facility. It was determined there were no available channels.

TABLE 1.0

FM Study for: MAXREPLY		FCC Database		29-37-06		
Location: MISSOURI CITY, TX		Channel Class: C3		95-32-15		
Call	City, State	Chan Class	Freq kW	Latitude	Dist.	
Status	Proponent	File Number	HAAT	Longitude	Azm.	
					Required Clear (km)	
----->>>>>>> Study For Channel 285 104.9 mHz <<<<<<<<						
KLTO	ROSENBERG, TX	285 A	104.9 2.55	29-39-54	21.9	142
LIC	ROY E. HENDERSON	BLH-930831KE	107	95-45-28	283.7	-120.1 SHORT
	Use of 73.215	for short spacing requires:			119	-97.1 SHORT
KLTP	GALVESTON, TX	285 A	104.9 1.90	29-23-45	81.5	142
LIC	TICHENOR LICENSE CORP	BLH-891116KF	123	94-44-10	107.4	-60.5 SHORT
	Use of 73.215	for short spacing requires:			119	-37.5 SHORT
KBUK	LA GRANGE, TX	285 A	104.9 3.00	29-52-57	131.8	142
LIC	FAYETTE BROADCASTING	BLH-5002	62	96-31-58	283.2	-10.2 SHORT
	Use of 73.215	for short spacing requires:			119	+12.8 CLOSE
KBUK	LA GRANGE, TX	285 A	104.9 6.00	29-52-57	131.8	142
APP	FAYETTE BROADCASTING	BMLH-970318KA	62	96-51-58	283.2	-10.2 SHORT
	Use of 73.215	for short spacing requires:			119	+12.8 CLOSE
KZAM	GANADO, TX	284 C2	104.7 50.0	28-57-15	117.96	117
CP	HOOTEN BROADCASTING,	BPH-940630MB	150	96-29-10	231.6	+0.96 CLOSE
KZAM	GANADO, TX	284 C2	104.7 50.0	28-55-37	143.2	117
APP	HOOTEN BROADCASTING,	BMPH-961016IA	140	96-46-54	237.9	+26.2 CLEAR
KKYS	BRYAN, TX	284 C2	104.7 50.0	30-42-59	145.9	117
LIC	RADIO SUNGROUP OF BRYA	BLH-891113KC	87	96-22-20	326.8	+28.9 CLEAR
KYKS	LUFKIN, TX	286 C	105.1 100.	31-22-08	212.1	176
LIC	GULFSTAR COMMUNICATIO	BLH-900827KA	325	94-38-45	23.6	+36.1 CLEAR

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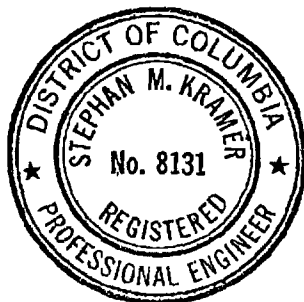
Engineering Affidavit

State of Texas)
) ss:
 County of Collin)

Stephan M. Kramer, being duly sworn, deposes and states that he is a Registered Professional Engineer licensed in Texas and the District of Columbia, that he holds a B.S. Degree in Electrical Engineering from the University of Akron, and that he is a qualified and experienced Communications Consulting Engineer whose expert testimony and works are a matter of record with the Federal Communications Commission having received numerous application grants. He further states Maxagrid Broadcasting Corp. retained the firm of Stephan M. Kramer, P.E. and Associates to prepare the attached Engineering Statement.

The deponent further indicates the Exhibit was prepared by him or under his direction and is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.

This declaration is made under penalty of perjury under the laws of the United States.



Stephan M. Kramer, P.E. 07-30-97

Stephan M. Kramer, P.E.
 Texas P.E. # 54370
 District of Columbia P.E. # 8131

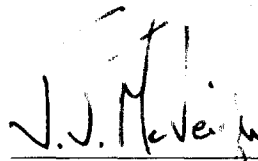
CERTIFICATE OF SERVICE

I hereby certify that I have this Thirtieth day of July, 1997, sent copies of the foregoing "**OPPOSITION TO JOINT PETITION FOR RECONSIDERATION**" by first class United States Mail, postage prepaid, to:

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